UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

IN THE MATTER OF:
BON SECOURS CHARITY HEALTH SYSTEM,
WARWICK HEALTHCARE CAMPUS
EMPLOYER, Case No. 2-RC-23303

and

1199 SEIU UNITED HEALTHCARE WORKERS EAST,

PETITIONER.

EMPLOYER'S EXCEPTIONS TO ALJ'S RECOMMENDED DECISION ON OBJECTIONS AND BRIEF IN SUPPORT OF EXCEPTIONS

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CASES

Bon Secours Charity Health System, Warwick Healthcare Campus ("Employer WHC") submits the following Exceptions to Administrative Law Judge Steven Fish's ("ALJ") Recommended Decision on Objections ("Decision"), dated April 26, 2010, in representation case 2-RC-23303.[1]

PRELIMINARY STATEMENT

Bon Secours Charity Health System owns and operates St. Anthony's Community Hospital, Schervier Pavilion, a long-term and skilled nursing facility, and Mt. Alverno, an assisted living facility which together comprise the Warwick Healthcare Campus, in Warwick, New York. On September 12, 2008, in the midst of lengthy hearings regarding the appropriateness of the bargaining unit petitioned for by 1199 SEIU United Healthcare Workers East ("Petitioner Union"), the parties entered into a Stipulated Election Agreement scheduling an election for October 30, 2008 to determine whether Employer WHC's non-professional service employees desired to be represented by Petitioner.

A secret ballot election was conducted on October 30, 2008. The ballot count was 121 in favor of the Union and 118 against, with 11 ballots challenged by the Petitioner Union. On November 6, 2009, the Union filed 15 objections to the outcome of the election. There are no cross-objections or objections based on third-party or Board agent conduct.

On March 10, 2009, the National Labor Relations Board ("Board") issued an Order Approving Stipulation Regarding Challenged Ballot, Approving Request to Withdraw An Objection, and Notice of Hearing on Challenges and Objections. Petitioner Union previously requested the withdrawal of its Objection 11, leaving 14 objections for resolution.. The Board

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[1] Warwick Campus does not submit exceptions to the portion of Judge Fish's Decision that relates to the recommended dismissal of part or all of Objections 5, 6, 7 and 10. In dismissing the Petitioner's objections in this respect, the Judge Fish correctly found, *inter alia*, that the Employer had not engaged in objectionable conduct. (Decision, p. 27).

scheduled a hearing on the challenges and objections for April 6, 2009, which was subsequently adjourned to May 13, 2009. On May 5, 2009, Administrative Law Judge Joel P. Biblowitz granted the Employer WHC's Motion to Bifurcate Hearing, dividing the challenges and objections into separate hearings. On May 14, 15, 18, 19 and 20, 2009, ALJ Biblowitz conducted a hearing on the challenges.

On September 9, 2009, ALJ Biblowitz issued a Decision overruling four of the challenged ballots. On December 23, 2009, the Board issued a Decision adopting the ALJ decision and directed the opening and counting of the four ballots. On January 6, 2010, the four ballots,, as well as the ballot of an individual for whom the Petitioner Union withdrew its challenge, were counted. The revised tally of ballots, 123-121, established that the majority of valid votes cast rejected union representation.

On February 8, 9, 16, 17 and 18, 2010, Administrative Law Judge Steven Fish conducted a hearing on the remaining objections alleging that Employer WHC had engaged in unlawful threats, surveillance, and/or interrogation. [2]

On April 26, 2010, ALJ Fish issued his Decision dismissing Petitioner Union's Objections 6 and 10 and portions of Objections 5 and 7 and sustaining Objections 1, 3, 4, 8 and 9 and portions of Objections 5 and 7. (Decision p. 27). The ALJ "recommend[ed] that the election held on October 30, 2008 be set aside, and the case be remanded to the Regional Director to schedule a new election." (Id.).

Employer WHC excepts to those parts of the ALJ's Decision sustaining Petitioner Union's objections. For the reasons set forth below, Employer WHC respectfully requests that the ALJ's Decision sustaining the remaining objections be set aside.

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[2] On February 9, 2010, the Union withdrew Objection No. 2 and on March 1, 2010 the Union withdrew Objections Nos. 12 through 15, leaving nine objections for consideration by ALJ Fish.

EXCEPTIONS

Employer WHC takes the following, specific exceptions to the ALJ's Decision:

1. The ALJ's reliance on the testimony of employee Ashley VonHahsel[3] regarding comments at an October 2008 meeting by manager Mike Deyo despite the fact that VonHahsel's testimony was uncorroborated and contradicted by employee Val DeWitt. (Decision p. 5, lines 27-29).

2. The ALJ's finding that Petitioner Union met its burden of proof alleging that manager Mike Deyo's comments at an October 2008 meeting constituted objectionable conduct, giving the impression of unlawful surveillance. (Decision p. 6, lines 29-31).

3. The ALJ's reliance on the testimony of employee Carina Oros to find that supervisor Mary Dunkin posted a flyer creating the impression of surveillance of employees' union activities even though Oros' testimony was uncorroborated and contradicted by numerous witnesses, including supervisor Mary Dunkin and the Union's own witness, employee Val DeWitt. (Decision p. 7, lines 50-51).

4. The ALJ's finding that Employer WHC is responsible for the contents of the flyer allegedly posted by supervisor. Dunkin even though no employee would reasonably believe that the flyer's contents reflected WHC policy or spoke for WHC management. (Decision p. 9, lines 29-31).

5. The ALJ's finding that the Petitioner Union met its burden of proof that the flyer's statements constitute objectionable conduct, giving the impression of unlawful surveillance. (Decision p. 9, lines 44-46).

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[3] Notably, while the ALJ credited the testimony of all of the witnesses presented by the Petitioner Union in their entirety (including employee Ms. VonHahsel), he credited none of the testimony of any witness presented by the Employer WHC (with the exception of only a few discrete points).

6. The ALJ's finding that the Petitioner Union met its burden of proof that supervisor Dunkin's conduct in observing shift change activities was "out of the ordinary" and constitutes unlawful surveillance even though supervisor Dunkin regularly takes her smoke breaks at the same locations irrespective of union activities, that the duration of any such observations was short, that Dunkin was a good distance from the employees, and that Dunkin did not engage in any coercive behavior during the alleged observation. (Decision p. 11, lines 15-16).

7. The ALJ's reliance on the testimony of employees Catherine Fink, Val Dewitt, and Carina Oro to find that supervisor Dunkin engaged in three separate incidents constituting threats even though the testimonies were uncorroborated and contradicted by supervisor Dunkin and, in part, by manager Irene Caldwell. (Decision p. 14, lines 27-31).

8. The ALJ's finding that Petitioner Union met its burden of proof that supervisor Dunkin's comments, in three separate incidents, constituted unlawful threats even though, to the extent that statements are found to have been made, supervisor Dunkin's statements were merely predictions about the effects that unionization could possibly have on Employer OWC, and, therefore, lawful. (Decision p. 15, lines 30-31).

9. The ALJ found that the Petitioner met its burden of proof that Thomas Brunelle's comments during a October 2008 employee meeting constitute unlawful threats even though Mr. Brunelle's statements were merely predictions about the effects that unionization could possibly have on the Employer, and are therefore lawful. (Decision p. 19, lines 3-4, 15-16).

10. The ALJ's finding that Petitioner Union met its burden of proof that the statements in the flyer, allegedly posted by supervisor Dunkin, constitute an implied threat of discharge. (Decision p. 19, lines 40-41).

11. The ALJ's finding that Petitioner Union met its burden of proof that during the critical, pre-election period, Employer WHC unlawfully promulgated and discriminatorily enforced its prohibition against employees' use of WHC bulletin boards to post pro-union literature, despite record evidence to the contrary. (Decision p. 27, lines 33-36).

ARGUMENT IN SUPPORT OF EXCEPTIONS[4]

I. THE ALJ ERRONEOUSLY DETERMINED THAT EMPLOYER WHC ENGAGED IN UNLAWFUL SURVEILLANCE DURING THE CRITICAL PERIOD

The ALJ's finding that Employer WHC engaged in unlawful surveillance is unsupported by the record evidence in this case. (Dec. p. 6, 9 and 11) Because the evidence presented during the hearing fails to meet Petitioner Union's burden of proof, the ALJ erred in finding otherwise.

A. There is No Evidence that manager Deyo's Alleged Comment to employee VonHahsel Created the Impression of Surveillance

The ALJ's conclusion that during a meeting with employees, manager. Deyo's alleged comment to employee VonHahsel that "if anyone wants information about the Union they should attend [her] Wednesday union meeting," created the impression of surveillance is erroneous. (Tr. 25; Decision p. 6, lines 9-11). First, there is no testimony or other corroborating evidence establishing that Deyo made such a comment. Notably, Petitioner's witness, employee DeWitt, who participated in the employee meeting and who was able to recall and testify regarding comments that VonHahsel made during that meeting, including the comment that VonHahsel made immediately preceding Deyo's alleged comment had no memory of Deyo making a comment about the union meetings. (Tr. 160-61). The ALJ improperly reasoned that this key inconsistency did not contradict VonHahsel's testimony.

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[4] Citations to the transcript of the hearing record shall be referred to as "Tr. ___." Exhibits submitted at the hearing shall be referred to as "Ex. E-__," for exhibits submitted by the Employer, and as "Ex. P-__," for exhibits submitted by Petitioner.

Second, the failure of the Petitioner to corroborate VonHahsel's testimony in the face of conflicting testimony from its own witness obviated the need for Employer WHC to produce Deyo or question supervisor. Dunkin regarding the incident. Thus, no adverse inference was warranted from Employer WHC's decision to not offer Deyo for the sole purpose of contradicting an otherwise disproven statement.

Third, even assuming that VonHahsel's testimony is accurate, Deyo's comment did not constitute objectionable conduct. The Board's test for determining whether an employer has created an impression of surveillance asks "whether the employee would reasonably assume from the statement in question that his union activities had been placed under surveillance." *Tres Estrellas do Oro*, 329 NLRB 50, 51 (1999). The test does not look at the subjective belief of the employee. *MTD Prods., Inc.*, 310 NLRB 733, 742 (1993). There was no evidence presented that the regular Wednesday union meetings which, as testified to by VonHahsel, allegedly took place "a few rooms down from the hospital" (Tr. 56) were secret or not otherwise well-known by people on the Warwick campus. Indeed, having identified herself as "the leading advocates [sic] in the meeting" (Tr. 57) and testified to the close proximity of the meetings to the campus, it would have been objectively unreasonable for VonHahsel to have assumed that the only way that Deyo could have learned of the existence of these meetings was by surveillance.

Finally, Deyo's alleged reference made to VonHahsel regarding "[her] Wednesday union meeting" does not create the impression of surveillance since it does not refer in any way to VonHahsel's specific participation in any union activities. Rather, Deyo's alleged statement refers to VonHahsel's role as an "open union adherent" (Decision, p. 9) and not as an attendee at these specific meetings. That Deyo was found to have made a reference to the existence of these

regularly scheduled weekly meetings has no import whatsoever. The ALJ erred in finding otherwise.

B. There is No Evidence that Supervisor Dunkin Posted the Flyer at Issue and that the Substance of the Flyer Constituted Unlawful Surveillance During the Critical Period

1. Employee Oros' Testimony that She Saw Supervisor Dunkin Post the "Bullies" Flyer is Not Credible and is Contradicted by All Admissible Evidence

In response to Employer WHC's motion to dismiss this objection at the close of Petitioner Union's case, counsel for Petitioner advanced the argument that the alleged posting by the Employer's agent of a document critical of the Union and several alleged "pro-union" employees is sufficient to constitute a threat under the National Labor Relations Act ("Act"), 29 U.S.C. §§ 151 et.seq. . Notably, counsel for Petitioner specifically stipulated that it had no evidence that Employer WHC, or any of its agents, created the document. (Tr. 151-152). Rather, the Union relied entirely on the testimony of a single employee, Corina Oros. Oros' testimony is not credible and was contradicted by numerous witnesses, including at least one of the Union's own witnesses.[5] The ALJ's reliance solely upon Oros' testimony to sustain this objection was in error.

Petitioner elicited testimony from several witnesses who professed to seeing the flyer in question in or about August 2008. (Tr. 17, 119). None of Petitioner's witnesses testified to believing any connection existed between the creation and distribution of the flyer and Employer WHC. Several witnesses testified to next seeing the flyer in September 2008, only when fellow

[5] In addition to being unsupported, . Oros' testimony is also problematic to the extent that counsel for the Petitioner corrected the translation of statements made by, or otherwise attempted to testify on behalf of, Oros. (Tr. 76, 79, 81). The fact that Petitioner's counsel repeatedly corrected his own interpreter calls into question the veracity and accuracy of Oros' recorded testimony. For this interference alone, independent of any of the additional reasons discussed below, Oros' testimony should be discredited in its entirety.

employee Oros brought it to their attention. (Tr. 18, 119-120). At that time it is alleged that Oros informed several employees that she saw supervisor Dunkin post the flyer on a bulletin board at Maple Hall. (Tr. 18).

Interestingly, not only is Oros the only employee to allegedly see Dunkin post the flyer (Tr. 79), but Oros is the only employee to allegedly see the flyer physically hanging in the break room of Maple Hall. The fact that no other employee testified corroborating Oros to having seen the flyer posted, even though it allegedly was posted for at least 24 hours on a bulletin board in a break room where the Maple Hill nursing staff go for breaks and lunches is remarkable and calls into question Oros' testimony. (Tr. 77, 157). Indeed, at least one of the individuals who was identified in the flyer (employee DeWitt), acknowledged using that break room several times during the period the flyer was allegedly posted on the bulletin board, but did not recall seeing it at all. (Tr. 157). The failure of DeWitt to notice the flyer allegedly posted in the break room renders Oros' testimony even more suspect as DeWitt is the very subject of the alleged flyer, she testified to being familiar with the flyer, and said she had seen it in August 2008. (Tr.120). Moreover, other members of the nursing staff should have noticed the flyer if it really had been posted in Maple Hall in September 2008 -- as a number of witnesses testified to telling, or sharing it with, many other employees in August 2008. (Tr. 119, 200). Thus, Oros' testimony that, somehow, she was the *only employee* who saw the alleged inflammatory flyer which hung for 24 hours in a well-traveled, well-used area, by employees who surely would have also recognized the said flyer is highly suspect and Oros' testimony should not have been credited by the ALJ.[6]

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[6] Further, the ALJ improperly failed to credit Irene Caldwell's testimony to the extent that she testified that she saw Ms. Dunkin taking down a document possibly similar to the Bullies flyer. (Tr. 257). Ms. Caldwell's

(Footnote continued on next page)

2. The Substance of the Flyer Is Insufficient to Sustain Objection No. 5

The ALJ found that the statements contained in the flyer allegedly posted by supervisor Dunkin created the impression of surveillance as they identified four employees as alleged Union adherents (two of whom the ALJ found to be, in fact, open Union adherents). (Decision, p. 9). The ALJ's finding is wrong. First, the plain language of the "Bullies" flyer speaks on behalf of *other* employees who were clearly upset with the extensive pro-union activities of certain employees. There is nothing in their flyer suggesting that it speaks on behalf of management or that it was prepared by management. In fact, the document says "It's ok to support a union." That some employees felt strongly enough about the union campaign to circulate this flyer speaks to the conflict between and among the employees. It does not, in any respect, reflect or suggest any views of Employer WHC.

Second, it would be unreasonable for any employees named in the *September* 2008 flyer to assume that they were identified because they had been placed under surveillance, when the *same* individuals were identified in the *same* flyer in *August* 2008 (Tr. 17, 119) - a flyer that none of the witnesses testified to believing that Employer WHC helped create or distribute. Thus, even if the message was adopted by WHC, the identification of the employees within that message was the result of other employees volunteering that information and not from unlawful surveillance. Indeed, to the extent that the source of the information in the flyer is unclear, there is no reason to infer that it is the result of Employer WHC surveillance instead of internal employee complaints. *See SKD Jonesville Division L.P.*, 340 NLRB 101, 102 (2003) (finding that where a statement can be based on (1) what is heard from the grapevine or (2) what is the

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testimony further undercut employee Oros' testimony that supervisor Dunkin intended to broadcast or otherwise disseminate the message contained in the "Bullies" flyer.

result of spying; there is no reason to infer the latter as the source over the former). Therefore, as the content of the flyer makes clear that the information contained therein was either prepared or volunteered by fellow employees, it is was error for the ALJ to find that the flyer constituted objectionable conduct. *See, e.g., N. Hills Office Servs.*, 346 NLRB 1099, 1104 (2006) ("Volunteering information concerning an employee's union activities by other employees … particularly in the absence of evidence that management solicited that information, does not create an impression of surveillance."); *Guard Publ. Co.*, 344 NLRB 1142, 1144 (2005) (finding that employer's statements indicating employees had volunteered information about co-workers' union activities did not create impression of surveillance).

Cumulatively, employee Oros' testimony that she witnessed supervisor Dunkin post the flyer should have been disregarded as it was unsupported and directly contradicted by numerous witnesses and supervening facts. But even if the ALJ properly credited Oros' testimony, the ALJ erred in finding that the substance of the flyer is sufficient to sustain Objection No. 5. Consequently, the ALJ's determination regarding this Objection should be overruled.

C. Supervisor Dunkin's Mere Presence Near Public "Shift Change" Activities Did Not Constitute Unlawful Surveillance

1. Standard for Surveillance Under Board Law

The Board holds that "an employer's mere observation of open, public union activity on or near its property does not constitute unlawful surveillance." *Houston Garment Company*, 279 NLRB 565, 566-67 (1986). As the Board held in *Mitco Inc.*, 159 NLRB 812, 814, *enfd.* 388 F.2d 133 (2nd Cir. 1968), "union representatives and employees who choose to engage in their union activities at the employer's premises should have no cause to complain that management observes them." The Union provided no evidence to support the conclusion that Dunkin's

actions rose to the level of illegal surveillance rather than being merely incidental to, and legal, observation of open and public union activity.

2. Testimony Regarding Supervisor Dunkin's "Presence" at Union Shift Change Activities

Petitioner Union attempted to elicit testimony from a number of its witnesses that Nurse Manger Dunkin was "present" during the Union's shift change activities. A number of witnesses testified to seeing Dunkin near the entrance to either MAC or Schervier while the 3 p.m. shift change activities were taking place. (Tr. 29). The ALJ properly credited testimony that established that Dunkin took her smoke breaks within the designated smoking areas for each of the respective facilities, essentially the same locations where she observed the union activities and where all of the staff took breaks. (Tr. 390; Decision, p. 11, lines 18-20). Notably, all witnesses testified that when they saw Dunkin, she was smoking. (Tr. 29-30, 69).

While at MAC, witnesses testified to seeing Dunkin standing or sitting on a bench between 30 and 75 feet away. (Tr. 31, 179). There was additional testimony that there are trees and a hill between where Dunkin was seen sitting or standing at MAC and where the employees were standing during shift change activities. (Tr. 43). Employees testified that during all of September and October 2008 they saw Dunkin by the smoking area outside MAC at most on 2 or 3 occasions. (Tr. 67 ("2 or 3 times"); Tr. 169 ("1 or 2 times")). Employee witnesses testified that Dunkin was allegedly "present" at the MAC shift change activities for approximately 10 to 30 minutes. (Tr. 169, 30).

While at Schervier, witnesses testified to seeing Dunkin across the driveway or street from them, approximately 20 to 30 feet away. (Tr. 31, 130). At most, Dunkin was observed by the smoking area outside Schervier on only 5 or 6 occasions. (Tr. 67).

3. Supervisor Dunkin's Physical Presence Near Public "Shift Change" Activities does not Constitute Unlawful Surveillance

WHC is a smoke-free campus and employees may not smoke anywhere on the WHC property. (Tr. 229). For employees who smoke to comply with this rule, they typically go to the end of the respective driveways of MAC and Schervier, off the property, to smoke. (Tr. 229). In supervisor Dunkin's case, she often worked an extended schedule and took several smoking breaks throughout the day. Witnesses testified that Dunkin was seen going outside at numerous times during the day. (Tr. 147-148). Many witnesses testified that the area where Dunkin was alleged to be standing during the Union's shift change activities was at or near the designated smoking area. (Tr. 230). Witnesses also testified to seeing Dunkin at the designated smoking area with other people on a daily basis, including nurses, CNAs, and unit secretaries. (Tr. 230, 236). There was also testimony that Dunkin typically stood far away from the Schervier smoking location, walking down the street toward St. Anthony's Hospital rather than standing by the Schervier driveway. Indeed, because WHC is a smoke-free campus, residents and/or their family members regularly use the same area where Dunkin stood to smoke cigarettes. (Tr. 212). Sharon Allen, another WHC employee who smokes, identified the entrance to Schervier as the location where she chooses to take a smoking break. (Tr. 388). Significantly, no testimony was elicited to suggest any other location where smokers could congregate that would comply with the WHC smoke-free policy.

Dunkin testified that she often took a smoking break either shortly before or following the 3 p.m. shift change. (Tr. 487-88). Dunkin also testified that she had this general habit throughout 2008 and before and after the "critical period." (Tr. 487-89, 491). The fact that the off-campus smoking area at Schervier and MAC happened to be close in proximity to where the Union's shift change activities occurred does not meet Petitioner Union's burden to prove that

Dunkin engaged in illegal surveillance. Dunkin testified that she spoke on her cell phone or paid bills during her smoke breaks and that she avoided looking at the Union activity, being well aware of the prohibitions against surveillance. (Tr. 485, 491) Even one of the Union's own witnesses testified that Dunkin stood 75 feet away and that she was otherwise busy, including using her phone. (Tr. 180). Thus, the cumulative testimony fails to establish that Dunkin was doing anything that any other employee would not be doing during his or her smoking break.[7]

The ALJ erred in finding that Dunkin's regularly occurring conduct constituted surveillance under the Act. Dunkin's conduct was qualitatively different from that found to be unlawful surveillance in other Board decisions. Rather, Dunkin's conduct is akin to those cases where the Board finds that the employer's observance of the employees' Section 7 activities was inseparable from its regular and noncoercive practices. *See, e.g.*, *Wal-Mart Stores*, 340 NLRB 1216, 1217(2003), (finding that a manager's 30-minute observation while sitting on a bench outside the store of union handbilling taking place in the employer's public parking lot, unaccompanied by other coercive behavior, did not constitute unlawful surveillance); *Metal Industries*, 251 NLRB 1523, 1523 (1980) (finding that an employer did not unlawfully surveil its employees where the employer had a longstanding practice of going to the employee parking lot to say goodbye to its departing employees at the end of the workday); *Fremont-Rideout Health*

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[7] Given Petitioner's efforts to create the impression that supervisor Duncan regularly smoked nearby the Union's 3 p.m. shift change activities, it is interesting that not a single photograph or video was produced to show the frequency or length of Dunkin's presence. There should be an adverse inference drawn from the absence of such evidence.

Moreover, to the extent that Dunkin knew that shift change activities were occurring she specifically avoided smoking in those designated smoking areas. (Tr. 489). Dunkin's attempts to avoid the Union's shift change activities is self-evident in the number of times that Petitioner Union's witness testified to seeing Dunkin at those activities. Indeed, despite holding Union shift change activities up to 3 times a day, 5 days a week, Dunkin was seen at these activities by employees at most nine times. (Tr. 67). This is particularly noteworthy given the testimony that the Union was engaged in up to 50 shift change activities a week (5 days a week, 5 to 10 shift change activities a day) in September and October 2008. (Tr. 202).

Group, 2009 NLRB LEXIS 20, at *37 (N.L.R.B. Jan. 29, 2009) (ALJ finding that a manager's 90 minute observation of a union agents' table in the company cafeteria where both managers and employees frequented from 20 feet away, unaccompanied by other coercive behavior, did not constitute unlawful surveillance).

Dunkin's conduct was routine and not "out of the ordinary." Dunkin's presence in the *designated* smoking area where managers and employees smoked was routine and her consequent observation of employees engaged in *public* solicitations was unaccompanied by coercive conduct. The end of the driveway where the designated smoking area is located and where the Union shift change activities took place was an open area, and the union activity was in the open. This is not a case when an employer representative lurks in the background to surreptitiously hear or observe employee conversation and/or activity. Rather, this is a case where the representative openly stood in a designated area that she frequented regularly.

Given the relatively short duration of Dunkin's alleged observation, the ample distance between her and the employees, and her failure to engage in coercive behavior during the alleged observation, such facts fail to support a finding that her conduct was "out of the ordinary." *See Aladdin Gaming, LLC*, 345 NLRB 585, 586 (2005). The ALJ's determination regarding this Objection should be overruled.

II. THE ALJ ERRED IN FINDING THAT PETITIONER UNION PROVED THAT EMPLOYER WHC ENGAGED IN "THREATS" DURING THE CRITICAL PERIOD

A. Standard for "Threats" Under Board Law

The Board applies an objective test in evaluating party conduct during an election's critical period – in this case between July 3, 2008 and October 30, 2008. The question is whether the conduct at issue had the "tendency to interfere with the employees' freedom of choice" and "could well have affected the outcome of the election." *Cambridge Tool & Mfg.*

Co., 316 NLRB 716 (1995). Statements that are no more than predictions about the effects that unionization could possibly have on an employer, are lawful under Section 8(c) of the Act, as an expression of views without threat of reprisal or force or promise of benefit. *See Gissel Packing Co.*, 395 U.S. 575, 618 (1965). Moreover, such statements are entirely legal as long as they do not contain a threat to eliminate benefits before bargaining begins or to bargain regressively. *See, e.g., Pacific Lincoln-Mercury*, 312 NLRB No. 135 (1993).

B. Supervisor Dunkin's Individual Comments to the Three Employees Did Not Constitute Unlawful Threats

Employee DeWitt testified that supervisor Dunkin allegedly blurted out that "if the Union comes in here, they're going to take away your ten hour shifts" and that "if the Union comes in...it could drive your salary down to minimum wage." (Tr. 121). Employee Fink testified that, during a unit huddle, Dunkin stated that their "flexibility in shifts would be taken away." (Tr. 194). Employee Oros testified that two days before the election she was approached by Dunkin in the Maple Hall break room and told, that "if the Union wins they're going to take the self scheduling away and we are going to have shift changes." (Tr. 80-81). Oros stated that no other employees were present (Tr. 82), and that was the only thing that the two individuals said to one another. (Tr. 81). Based on the Union's evidence, these three statements were the only statements allegedly made in the four-month critical period about the subject of flexible scheduling. Importantly, no one testified to being concerned about or even believing these alleged statements.

1. Comments Allegedly Made by Manager Caldwell and Supervisor Dunkin to Employee DeWitt are not "Threats" under the Act

Employee DeWitt testified to participating in an "incident" at work the second week of October which involved manager Caldwell, then acting Director of Nursing, and supervisor Dunkin. (Tr. 120-121). DeWitt testified that at approximately 11:40 a.m. on an otherwise

unidentified date in the second week of October 2008, she was exiting the facility with her jacket on when Dunkin asked her where she was going. (Tr. 121). DeWitt proceeded to "tell" Dunkin that she was going on her break. (Tr. 121). When Dunkin stated that it was too late to go on the break, DeWitt got upset and asked to speak to Caldwell. (Tr. 121). DeWitt testified that Caldwell, Dunkin, and herself proceeded to the Maple Hall break room, where DeWitt began telling Caldwell about being denied a break when Caldwell allegedly interrupted DeWitt and stated "I am so sick of this Union shit." (Tr. 121). Caldwell then allegedly stated that she was "sick of [DeWitt] disprespecting Mary [Dunkin]." (Tr. 121).

Employee DeWitt's uncorroborated testimony regarding statements allegedly made in a meeting with manager Caldwell and supervisor Dunkin, as well as the occurrence of that very meeting, are directly contradicted by the testimony of Caldwell and Dunkin. Indeed, in addition to Dunkin (Tr. 472), Caldwell specifically and credibly denied having any knowledge of such an incident. (Tr. 226).[8] Caldwell additionally denied ever telling Dewitt that she was "sick of [her] disrespecting" Dunkin. (Tr. 227). Like Caldwell, Dunkin does not recall such a statement being made. (Tr. 472). Finally, Caldwell also denied ever hearing Dunkin make the statement "that if the union comes in they'll take away your 10 hour shifts and your pay will be lowered to minimum wage" (Tr. 229), a statement that Dunkin vehemently denies making. (Tr. 472).

Manager Caldwell also specifically denied ever telling employee DeWitt, or stating in her presence, that she was "sick of this union shit." (Tr. 227). Supervisor Dunkin also refuted DeWitt's claim regarding Caldwell. (Tr. 472). While Caldwell did acknowledge that she made

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[8] The ALJ surprisingly mischaracterizes manager Caldwell's testimony as somehow being "equivocal" and relies upon the phrasing Caldwell used in a single denial ("No. I Don't recall it. No.") as evidence that she was "hedging." (Decision, p. 14, line 46). However, as further described in this brief, Caldwell was consistent and clear in her absolute denunciation of employee DeWitt's testimony and support of supervisor Dunkin's testimony.

the statement either that she was "sick of this union shit" or that she was "tired of this shit," she testified that the statement was made *after* the Union election and, to the best of her knowledge, no one was present when she made the statement. (Tr. 227-28, 251).[9] Caldwell also explained that this statement was the product of working a 16 hour day, being overtired, and there being a lot of conflict among the employees, including some friendships that were broken-up. (Tr. 232).

Manager Caldwell additionally testified that she did not have strong feelings one way or the other about the Union coming into the facility and, in fact, "did not know what [employee DeWitt's] views were [regarding the Union]." (Tr. 231, 253). Caldwell testified that she previously worked in another facility which was unionized and, in comparing the situations, credibly stated that "everybody's entitled to their own opinion." (Tr. 231). Indeed, in terms of the result of the election, Caldwell credibly testified that she did not personally care one way or the other what the outcome was. (Tr. 232).

Given the record evidence, the ALJ erred in not crediting manager Caldwell's unequivocal testimony that supervisor Dunkin did not threaten employee DeWitt. Moreover, the credible evidence establishes that the ALJ erred by finding that Employer WHC made unlawful threats. Moreover, there was no legal or factual basis for the ALJ to find that any of the alleged Employer statements could have affected the outcome of the election. The ALJ's determination regarding this Objection should be overruled.

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[9] While manager Caldwell testified with exacting particularity regarding the time, date and place where she made this statement (Tr. 227, "I can remember that it was October [30] at 7:30, 8 o'clock at night, I was getting off the elevator and – I did say those words") ALJ Fish inexplicably found that this testimony was "somewhat supportive of DeWitt's testimony" that manager Caldwell made the statement *sometime* in the second week of October. (Decision, p. 15). While discounting manager Caldwell's denial that the meeting and resulting conversation as testified to by employee DeWitt *never* took place and that she *never* made this statement to Ms. Dewitt, ALJ Fish found that as Caldwell acknowledged making the statement *somewhere* at *some time* that it "supports DeWitt's testimony that Caldwell would have made the comment to her." *Id.* The ALJ's reasoning and conclusion are patently flawed and should be rejected.

2. Comments Allegedly Made by Supervisor Dunkin to Employees Oros and Fink are not "Threats" under the Act

Employee Oros' testimony regarding supervisor Dunkin's comments is unsupported and manifestly unbelievable. First, it is important to note that no other witness testified to Dunkin approaching them individually to discuss, in any manner, the Union. Indeed, despite preparing a signed affidavit at the Petitioner Union's request a day after the election, Oros failed to identify this or any other incident regarding Dunkin. (Tr. 94; E-1). Second, Dunkin herself contradicted Oros' testimony regarding such incident. (Tr. 467-69). Third, the lack of any context or motivation for Dunkin's alleged comments, further undercuts the veracity of Oros' statements. Finally, Oros testified to contemporaneously notifying other employees regarding all of the other incidents that she later alleged constituted unlawful conduct, *except* for this incident. Oros' testimony that Dunkin made these statements is not credible and should be disregarded.

Significantly, there is no evidence that anyone else was subjected to, or informed of, the alleged conversation between supervisor Dunkin and employee Oros. Given the isolated nature of the alleged misconduct, the non-existent dissemination to other voters (none of the other witnesses testified to hearing about, let alone witnessing, this incident), and the relatively large size of the bargaining unit, "it is virtually impossible to conclude that the election outcome has been affected." *Bon Appetit Management Co.*, 334 NLRB 1042, 1044 (2001) (citations omitted).

Similarly, Petitioner Union's reliance on testimony by employee Fink is weak at best. Despite huddle meetings being held quite often, Fink was only able to testify about one incident when supervisor Dunkin mentioned, in any context, the Union. (Tr. 195). The isolated nature of this comment, as well as the failure of Petitioner Union to provide any corroborating witnesses or evidence, militates against giving any weight to the alleged comment. Indeed, Fink's specific recollection of an isolated comment made by her manager, that did necessarily concern her or her

scheduling, is additionally undercut as Fink could neither remember the day, week or month of the alleged comment, or who else participated in that meeting.[10] (Tr. 193, 197). Accordingly, the ALJ's determination regarding this Objection should be overruled.

3. Assuming that the ALJ Properly Credited Petitioner Union's Proffered Testimony, the ALJ Erred in Not Finding that Supervisor Dunkin's Statements Constituted Lawful Predictions

Supervisor Dunkin adamantly denied threatening employees with the loss of, or changes to, their flexible shifts. (Tr. 467, 472, 474-75).[11] Instead, Dunkin admits to making the legitimate points on behalf of management, that terms and conditions of employment need to be negotiated, and that present practices could change as a result of those negotiations. (Tr. 516). These kinds of statements are lawful and legitimate and do not constitute threats. For example, Dunkin's alleged statements could be construed as predictions about the effects that unionization could have on Employer WHC (i.e. changes in scheduling based upon a change to a seniority system) and such comments would be lawful. *See Gissel Packing Co.*, 395 U.S. at 618. Dunkin also credibly testified that she did not use the unit "huddle" as a forum for speaking about the ongoing union campaign. (Tr. 463).

For these reasons, the ALJ's findings regarding Objections 1, 3, 4, 6, 9 and 10 should each be overruled.

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[10] Although employee Fink testified that she didn't "know specifically who was there on that particular date" she made a few guesses, including that it could have been employee DeWitt. (Tr. 197). Notably, DeWitt also testified in this hearing and, along with all of the other witnesses that testified for either party, DeWitt failed to mention or even acknowledge that such an incident occurred.

[11] Notably, supervisor Dunkin testified that, while she had not previously been involved in a representation campaign, she received information regarding the rules of what can and cannot be said to employees. (Tr. 463-64). Dunkin described this education as prohibiting threats, intimidation, promises and surveillance by management. (Tr. 464). Dunkin additionally stated that she did not have a personal point of view as to whether a union coming onto WHC would be a good or bad thing. (Tr. 466). Indeed, her sister, children, ex-husband and brother are all union employees, and have nothing bad to say about their respective experiences with unions. (Tr. 466). There was no evidence introduced to rebut this testimony.

C. Manager Brunelle's Comments During Town Hall Meetings Did Not Constitute Threats

1. Manager Brunelle Did Not Threaten to Change and Make More Onerous Employees' Work Assignments

The Union's Objection No. 4 alleges that the Employer threatened to change employees' work assignments and make them "more onerous." The ALJ found that Tom Brunelle's, the former EVP of the Warwick Campus, statement at a town hall meeting to the effect that changes may be made to the policy of flexible scheduling were the Union voted in constituted objectionable conduct.

Specifically employee VonHahsel testified that manager Brunelle stated that "if the Union came in [employees] would lose special privileges like flexibility." (Tr. 22). At the outset, Brunelle's testimony should have been viewed as highly credible given that he is no longer employed by, or affiliated with, Bon Secours and because he clearly harbors some hard feelings about how his employment ended. (Tr. 433, "I was basically told don't let the door hit you"). Regarding the subject of flexibility, Brunelle testified that:

> [I]t was my experience in a union environment the management team has less flexibility in dealing with individual employee concerns, and that once a contract is negotiated and in place that sets the rules of operation for the organization and the set of relationships, and that the contract prevails, that is does reduce flexibility in individual employee issues. (Tr. 422).

It was this experience and perspective that Brunelle shared with employees on the Warwick Campus. He further testified that, in his statements on the subject, he was explaining to employees what *could* happen during negotiations if the Union were voted in. (Tr. 451). His statements on the subject of flexibility and other subjects were made in the context of the larger

picture of educating employees as to what takes place during collective bargaining negotiations. (Tr. 451).

Notably, no employee testified that Brunelle had a threatening or otherwise hostile demeanor during any of the meetings he held or on any other occasion. Brunelle's demeanor was described as "laidback," "amiable," "jovial" and acted primarily in the role of providing information. (Tr. 290). A number of employee witnesses confirmed that during the meetings, Brunelle did not yell, point his finger at anyone, pound the table, or the like. (Tr. 37-38). Nor did Brunelle single out any particular person when he was speaking. (Tr. 38). Rather, Brunelle spoke in general terms. (Tr. 39). Brunelle's meetings were further characterized as having a tenor of education, advising the employees not to not jump into anything that they were uncomfortable with or didn't fully understand. (Tr. 293). There was no testimony that Brunelle's meetings were anything other than an attempt by him to educate the employees regarding effects that unionization could possibly have on Employer WHC. Such observations are lawful under Board law. *See, e.g., Gissel Packing Co.*, 395 U.S. 575, 618 (1965).

Brunelle had significant prior experience in unionized settings, including union campaigns, and he was very familiar with lawful management behavior. (Tr. 414-415). Indeed, he understood the rules against threats, intimidation, promises and surveillance and he firmly believed that he comported himself in compliance with those rules. (Tr. 420-21). Brunelle lawfully conveyed to the employees at these town hall meetings his personally held belief that there was a positive environment on the WHC campus and that while he hoped that the campus would remain union free, he nevertheless encouraged people to gather as much information as they could before making a decision, "and not to base their decision on information that they were getting from [him], or solely from the union organizers." (Tr. 420).

The credible evidence clearly establishes that Mr. Brunelle made no statements that could be considered threatening to employees so as to sustain Petitioner Union's Objection No. 4. Accordingly, the ALJ's determination regarding this Objection should be overruled.

2. Manager Brunelle Did Not Threaten Employees with the Loss of Wages and Salary Increases If the Union Were Voted In

Petitioner Union's Objection No. 1 alleges that Employer WHC representatives threatened employees with the loss of wages and salary increases if the Petitioner Union were voted in. To support this objection, the Union elicited testimony to the effect that manager Brunelle stated at a meeting several days before the election that "everything gets frozen."

First, regarding the alleged statement by Brunelle, the Union's witnesses admitted that Brunelle's demeanor during employee meetings was non-threatening – he did not raise his voice and he portrayed a mild temperament. Second, this statement, if made, was in front of no more than 9 out of more than 260 eligible voters. (Tr. 166). Third, no one testified that they felt threatened or fearful that any salary increases would be at risk if the Union were voted in. Fourth, as to the substance of what is alleged, Brunelle testified credibly that any statement to the effect of wages being "frozen" was merely in the context of his explaining to employees the process of collective bargaining – a process with which he was very familiar. (Tr. 421). In fact, it is usually the case when a first contract is being negotiated, the Employer is not free to unilaterally implement salary increases. As Mr. Brunelle repeatedly stated, increases were one of the terms and conditions of employment that needed to be negotiated with the Union. The Board has routinely found that employer statements that preexisting terms and conditions of employment are subject to the collective bargaining process do not violate the Act. *See Mantrose-Haeuser Co.*, 306 NLRB 377 (1992) (employer statements that employees "take the risks" with wages and benefits when a union is elected did not constitute an unlawful threat in

violation of Section 8(a)(1) of the Act); *Flexsteel Industries, Inc.*, 311 NLRB 257 (1993) (employer statements "present benefits could be lost" and the "company could not unilaterally give a wage increase" do not violate the Act because the statements merely describe "what lawfully could happen during the give and take of bargaining with the union"); *Venture Industries, Inc.*, 330 NLRB 1133, 1140 (2000) (employer's statements that benefits could be "put at risk" and that "if the employees select the union as their collective bargaining representative, wages, overtime, and benefits become negotiable" were not implicit threats to decrease benefits). In sum, Brunelle's statement does not constitute an unlawful threat. The ALJ erred in sustaining Objection No. 1.

3. Manager Brunelle Did Not Inform Employees that Union Representation Would be Futile

Petitioner Union alleges in Objection No. 9 that Employer WHC informed employees it would be futile for them to select the Union. The only evidence offered in support of this objection is the allegation that at one meeting manager Brunelle allegedly told employees that "it would take years to get a contract if the Union was voted in, everything would be frozen, there would be no annual pay raise and employees won't be able to do flexible scheduling any more." (Decision, p. 19). Petitioner produced only one witness regarding this alleged statement. With the exception of employee McSherry, no other witness, including Brunelle, recalled him saying, in sum or substance, that it would take years to get a contract. (Tr. 292, 425, 447). To the contrary, Brunelle framed his statements to employees in terms of the nature of the collective bargaining process and explained that the time to get a contract could be short or long in duration. (Tr. 292, 426).

Brunelle's testimony as to what he said on this subject should have been credited over the testimony elicited by Petitioner. While Brunelle did not deny making statements about the

collective bargaining process, what he recalled saying on those subjects was lawful (Tr. 421-22). No other witness recalled Brunelle stating, in sum or substance, that everything would be frozen if the union came in. (Tr. 292, 426, 447). Instead, Brunelle stated that, depending on where WHC and the Union wound up in negotiations, any individual term or condition could go up or down, or stay the same. (Tr. 292, 421). Substantively, what Brunelle is alleged to have said does not constitute a threat. He is not alleged to have said anything to the effect that "he would make sure" it takes years to get a contract, or any other statement that evidenced personal animosity toward the union. Brunelle's tone was matter-of-fact as was the information he was providing. The ALJ's recommendation regarding Petitioner Union's Objection No. 9 should be overruled.

III. THE ALJ ERRED IN FINDING THAT THE ALLEGED FLYER POSTED BY SUPERVISOR DUNKIN CONSTITUTED AN IMPLIED THREAT OF DISCHARGE

The sole evidentiary basis for Objections 3 and 7 is Petitioner Union's Exhibit 1 – the "Bullies" flyer. For all the reasons set forth herein, Exhibit 1 does not, by its terms, support Petitioner's Objections 3 and 7, nor is there any credible evidence linking the document to the Employer. The ALJ erred by finding that Petitioner's Exhibit 1 supported Objections 3 and 7. Neither the substance of the flyer, nor the alleged circumstances of its alleged posting, are sufficient to establish any threat by Employer WHC to a loss of jobs were the Union voted in. [12]

First, as noted above, the plain language of the "Bullies" flyer speaks on behalf of other employees and does not suggest that it is speaking on behalf of WHC or that it was, in any respect, prepared by management. Second, the substance of Petitioner Union's Exhibit 1 does not speak at all to threatened job loss – either explicitly or implicitly. The document appears to

[12] Notably, Petitioner offered absolutely no evidence that Employer representatives made any verbal statements to any employee that threatened them with the loss of jobs if the Union were voted in.

be speaking on behalf of other "rank and file" employees who are tired of being "harassed", "intimidated" and "terrorized" at work by Union supporters. The flyer does not, on its face, purport to speak on behalf of WHC management and it does not threaten employees with job losses were the Union to win the election.

The ALJ's finding that the last sentence, suggesting that if the "bullies" want to work in a union facility they should "go to one that already has a union", constitutes a threat of job loss or that union support is incompatible with continued employment is erroneous. The ALJ's reliance on *Jupiter Medical Center Pavilion*, 346 NLRB 650, 651 (2006), and related cases is misplaced. In *Jupiter Medical Center Pavilion*, the respondent conducted a number of employee meetings in response to a union organizing campaign. At one such meeting, an employee criticized the way management treated its workers. A supervisor replied, "Maybe this isn't the place for you . . . there are a lot of jobs out there." Reversing the administrative law judge, the Board held that the statement violated Section 8(a)(1) of the Act.

The *Jupiter Medical Center Pavilion* holding is inapposite to the facts in the present case. Specifically, the statements contained within the "bully" flyer are not a response by management to its employees regarding their dissatisfaction with working conditions. Rather, the flyer reflects the view of certain employees that co-workers are acting in a "terrorizing" and "threatening" manner. The complaint by employees that they felt terrorized by other employees is wholly separate from whether or not employees could or should engage in union activities, including expressing their dissatisfaction with working conditions. Indeed, the flyer clearly states on its face that "it is ok to support a union." The flyer simply indicates employees' resentment of what they considered threatening tactics by certain employees. The ALJ's finding

that the quoted comment implies that support for the Union is incompatible with continued employment is erroneous.

As discussed previously, Petitioner Union's attempt to attribute its Exhibit 1 to Employer WHC fell flat. (*see infra*, pp. 7-8). Nevertheless, even if the ALJ properly credited employee Oros' testimony, the substance of the flyer simply does not support the allegations in Petitioner's Objection Nos. 3 or 7. The ALJ's finding on Objections Nos. 3 and 7 should be overruled.

IV. THE ALJ ERRED BY FINDING THAT PETITIONER UNION MET ITS BURDEN TO ESTABLISH THAT EMPLOYER WHC DISCRIMINATORILY ALTERED ITS RULES REGARDING POSTING OF LITERATURE DURING THE CRITICAL PERIOD

Petitioner Union elicited testimony that employees saw various items posted on bulletin boards in Schervier Pavilion,[13] in addition to materials produced by WHC or its management, including: advertisements for the sale of jewelry; cards from residents' families; and Avon related materials. (Tr. 127). However, Petitioner's witnesses failed to identify whether the documents were hung during the relevant critical period (Tr. 48) and whether they were approved or initialed by either HR or WHC administration. (Tr. 127-128). The Petitioner also elicited testimony that certain employees were allegedly denied permission to post pro-union material and that such material would be removed because of WHC's posting policy. (Tr. 25, 123, 124-125; P-2).

The ALJ correctly observed that an employer is under no obligation to permit employees to use its bulletin boards to post pro-union materials or literature even where the employer itself uses the same bulletin boards to post its own anti-union messages. *Register Guard*, 351 NLRB 1110, 1114 (2007). However, the ALJ incorrectly found that the Petitioner's evidence

[13] Notably, despite the presence of bulletin boards in all three facilities, Petitioner has directed its objection solely to the bulletin boards hung in Schervier Pavilion.

established that the Employer both unlawfully promulgated and discriminatorily enforced its prohibition against employees' use of its bulletin boards to post pro-union literature. (Decision, p. 24, lines 37-39). The ALJ's finding is contrary to record evidence and Board caselaw.

1. WHC has Uniformly Applied its Posting Policy

Despite the ALJ's finding to the contrary, WHC has an established policy regarding the posting of materials that is widely disseminated to managers and employees. Although the posting policy is unwritten and, for that reason, may have contributed to some of the alleged confusion regarding its application, credible hearing testimony established that the policy was applied in a non-discriminatory manner. Thus, no adverse inference should be ascribed to the enforceability or application of WHC's posting policy solely because it is not in writing.

Employer's Director of Human Resources Clark testified that WHC has a two-tiered policy for posting depending on whether the posting is for designated Human Resources/ Administration boards or for other boards, such as departmental boards. (Tr. 314). According to Clark, posting on either a Human Resources or Administration board strictly requires advance approval by Human Resources or Administration, the policy is more liberal for posting on other boards. (Tr. 314). However, as the testimony at the hearing established, the administration and staff of Schervier Pavilion uniformly administered its interpretation of that policy, which did not apply a two-tiered distinction. As stated by the witnesses, the majority of the staff and administration of Schervier Pavilion (including the managers of all of Petitioner Union's relevant witnesses) opted to defer to the decision of Human Resources and Administration for all postings. (Tr. 373, 475). Deferral obviated the need for individual managers and supervisors to make ad hoc decisions. (Tr. 370). Moreover, such deferral pre-dated the beginning of Union activity. As Mr. Clark testified, at the beginning of Union activity, individual managers were unsure about whether certain postings should be taken down or left untouched. (Tr. 363). At that

time, WHC educated the individual managers and instructed them that "if [they] allow[ed] people to come in and request to post this information or request … whatever that might be, if you allow that, [then they are to] follow the same process with anything else." (Tr. 363-64). Importantly, this education occurred well in advance to the filing of the petition for an election. (Tr. 375).

The WHC posting policy was communicated through meetings and numerous verbal communications. (Tr. 354). Consequently, it is not unusual that the majority of witnesses testified to sharing the same understanding that there is a requirement that postings be approved by Human Resources or Administration. (Tr. 314). When permission was sought to post items, the normal procedure would be that the respective member of Human Resources or Administration would initial the posting to identify that it had, in fact, been approved. (Tr. 357). Witnesses identified numerous occasions when the pre-approval policy was utilized. (Tr. 355, 475). Similarly, there were other times were employees' requests to post items were denied. (Tr. 356).

Regarding employees' testimony about seeing postings of a "personal" nature, the employee witnesses failed to identify whether the postings were approved by HR or a member of Administration. Indeed, much of the testimony regarding postings of "personal" flyers was general in nature and did not involve postings during the relevant time period. (Tr. 48).[14] Moreover, such testimony was disputed by several witnesses, including Shannon Allen, a per diem CNA and unit clerk who was an eligible voter in the election. (Tr. 403). The employees'

[14] Notably, despite making broad statements regarding the alleged proliferation of "personal" or "non-approved" postings throughout Schervier Pavilion, Petitioner Union failed to produce a single picture or other corroborating evidence of such a posting. The absence of such evidence is especially notable given that the Petitioner and/or its supporters had access to, and indeed used such access to take pictures of, the bulletin boards. (P-2).

testimony was also contradicted by WHC manager Clark, who testified that the managers were re-educated prior to the filing of the petition, resulting in a uniform application of the bulletin board posting policy during the entire pre-election period. (Tr. 375).

It is important to recall that employees were never disciplined or otherwise counseled for posting "pro-union flyers," nor were employees yelled at or challenged in an aggressive manner. (Tr. 55). No employees were disciplined or counseled despite testimony that managers witnessed employees putting up unauthorized postings every day. (Tr. 159). In each case and pursuant to WHC's policy, managers removed all unauthorized or un-initialed postings. (Tr. 355, 506).

Finally, there is no allegation that any Employer restriction on the employees' ability to post "pro union" flyers had any effect on employee access to Union information. Petitioner's witnesses conceded that there were a lot of "pro union" fliers at the facility. (Tr. 49). And, pursuant to WHC's solicitation policy, employees were permitted to hand flyers out to co-workers and place flyers in public areas. (Tr. 54, 430).

2. Employer WHC Did Not Discriminatorily Enforce Its Posting Policy with Respect to Employees VonHahsel and DeWitt

Hearing testimony established that only two employees, VonHahsel and DeWitt, requested to post pro-union materials at the campus. Both employees were correctly informed of WHC's posting policy, but for reasons best known to them, each failed to seek proper approval for posting their desired material. Although the ALJ appears to take issue with manager Deyo's alleged statement in early October 2008 that employee VonHahsel "couldn't [hang pro-union leaflets around the facility] because it was against policy," such statement was a correct account of WHC's posting policy. (Tr. 25). Indeed, by the very terms of her request, Deyo would have been correct to understand that VonHahsel was seeking the unrestricted ability to post fliers

throughout the facility. Because of the expansive nature of her request, Deyo was not in the position at that meeting to grant VonHahsel's request. Indeed, to the extent that VonHahsel's request was construed as requesting to post on Human Resources bulletin boards, she still would have needed the advance authorization of a member of Human Resources. Moreover, her request encompassed not only bulletin boards, but seemingly all walls within the facility. To that extent, it is inconceivable that Deyo, or any manager, would have given any employee such unlimited permission to post anywhere. Deyo acted reasonably when he denied VonHahsel's request.

Similarly, to the extent that employee DeWitt sought permission from supervisor Dunkin to post in the Maple Hall break room, Dunkin's denial was appropriate since DeWitt admittedly failed to seek prior approval from Human Resources or Administration. Regarding Dunkin's alleged use of the term "illegal," such comment was uncorroborated and, ultimately, of no moment, as Dunkin appears to have properly informed DeWitt and all other employees in her unit of WHC's posting policy. (Tr. 476-77). Thus, to the extent that the notice that was allegedly posted on the bulletin board in Maple Hall, stating that "there are only postings on [sic] material approved and initialed by HR" (P-2), is properly attributed to Dunkin, it is unclear why such a posting or statement is deemed improper by the ALJ. Nor is it apparent why Dunkin's enforcement of WHC's non-discriminatory policy regarding the removal of unapproved or uninitialed, posted material was objectionable. Indeed, like employee VonHahsel[15], despite

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[15] Employee VonHahsel's general statement that she complained to various members of management regarding her inability to post pro-union fliers around the facility is unsupported and directly contradicted by the testimony of managers Clark and Brunelle who testified that no employee ever approached them regarding posting pro-union fliers. (Tr. 314, 430). Indeed, VonHahsel's recollection of complaining to management about her inability to post pro-union fliers is further belied by the fact that she appeared to only recall making those complaints when she was questioned during cross-examination (despite being questioned regarding essentially the same instances on direct examination).

being told that her postings did not comply with WHC's policy, DeWitt failed to seek appropriate approval to hang the documents.

The ALJ's finding that Employer WHC discriminatorily enforced its posting policy, when the employees who allegedly sought to post failed to seek appropriate approval, is in error. Employer WHC's policy requiring the approval of all items posted (and the resulting removal of those that were not) was applied in a non-discriminatory manner. *See Register Guard*, 351 NLRB at 1118 ("discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status"). The ALJ's finding on Objection 8 should be overruled.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Board should uphold the ALJ's Decision dismissing Objections Nos. 6 and 10 and portions of Objections Nos. 5 and 7, and reverse and set aside the ALJ's Decision sustaining Objections Objections Nos. 1, 3, 4, 8, and 9 and portions of Objections Nos. 5 and 7.

Dated: May 10, 2010
New York, New York

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that Bon Secours Charity Health System's foregoing Exceptions to ALJ's Recommended Decision on Objections and Brief in Support of Exceptions was served on the following individuals, via e-mail, on this the 10th day of May, 2010:

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